UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRAVIS DWIGHT GREEN	§	
	§	
VS.	§	**No. 4:13-cv-01899**
	§	
LORIE DAVIS, DIRECTOR,	§	
TEXAS DEPARTMENT OF CRIMINAL	§	***HEARING ON MOTION***
JUSTICE–INSTITUTIONAL DIVISION	§	***REQUESTED***

CROSS MOTION SEEKING RECONSIDERATION OF DENIAL OF RELIEF WITHOUT HEARING ON INEFFECTIVENESS OF COUNSEL CLAIMS; AND REPLY TO RESPONDENT'S MOTION TO RECONSIDER ORDER GRANTING A RETROSPECTIVE COMPETENCY HEARING.

TO THE HONORABLE KEITH M. ELLISON, UNITED STATES DISTRICT JUDGE:

Green files this Cross-Motion for reconsideration of this Court's March 29, 2016, Memorandum and Order ("Memorandum"), files a Brief in Support of the Cross-Motion, and replies to Respondents Motion for Reconsideration (DE [57]) as follows:

CROSS-MOTION FOR RECONSIDERATION

1. Judgement has not been entered in this case. Hence, this motion is properly considered pursuant to Federal Rule of Civil Procedure 59(e) as opposed to 60(b).

2. Green seeks reconsideration of summary dismissals of the First, Fifth and Sixth Claims alleged in his Amended Petition for a Writ of Habeas Corpus. DE [30]. Reconsideration is warranted if the Memorandum and Order ("Memorandum") dismissing these claims rests on manifestly erroneous findings of fact or manifestly erroneous legal rulings. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (internal quotation marks and citation omitted). Other bases are manifest injustice and misapprehension of a party's position. *In re Benjamin Moore & Co.*,

318 F.3d 626, 629 (5th Cir. 2002); *Foutty v. Equifax Services, Inc*., 764 F. Supp. 621, 622 (D. Kan. 1991).

3. Green also moves this Court to reconsider the decision not to hold an evidentiary hearing on Green's First, Fifth and Sixth claims for relief. The district court has "wide discretion in determining when to reopen an evidentiary hearing." *United States v. Mercadel*, 75 Fed. Appx. 983, 2003 WL 21766541, *6 (5th Cir. 2003) (unpublished); *see United States v. Wilson*, 249 F.3d 363, 372 (5th Cir. 2001) ("The district court has considerable discretion whether to consider evidence on a motion for rehearing), abrogated on other grounds by Whitfield v. United States, 543 U.S. 209, 214–18 (2005). The district court "abuses its discretion where new evidence creates a genuine factual dispute on an outcome determinative fact." *Id.* (emphasis added) (citing Wilson, 249 F.3d at 372, 373 n.3).

4. Claim One alleged that trial counsel was ineffective under *Strickland v. Washington,* 466 U.S. 668 (1984), for not investigating mitigating evidence. Claim Five alleged that trial counsel was ineffective under *Strickland* for not objecting that Green was incompetent to stand trial and for no requesting expert assistance to litigate this Due Process Claim. Claim Six alleged that trial counsel were ineffective, under *United States v. Cronic,* 466 U.S. 648 (1984), for failing to investigate and contest Green's right to represent himself.

5. Green alleged with respect to all trial IAC claims that state habeas counsel was ineffective for not raising them in state proceedings, so under *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), Claims One, Five and Six were not defaulted.

6. The Memorandum denied relief primarily on the ground that Green did not satisfy the **deficiency** prong of the *Trevino* analysis. *Memorandum* at 12, 14. That is, the Memorandum

determined he did not show state habeas counsel's performance fell beneath reasonable professional standards. The Memorandum did not clearly reach the merits of Green's claim except as the merits affected the *Trevino* analysis.

MANIFEST ERRORS OF LAW AND FACT

7. Underlying the procedural default of Claims One, Five and Six are several fundamental legal errors.

8. First, the Memorandum takes the position that state habeas counsel could limit his investigation to the "trial record." *Memorandum* at 12, 14, 18. However, Texas law precludes post-conviction causes of action that arise from the trial record. Such claims can be brought on direct appeal, so confining a post-conviction investigation to the trial record is per se ineffective for habeas counsel. The Memorandum's premise that state habeas counsel could forego investigating IAC claims centered on Green's competency to stand trial is a manifest error of law.

9. Second, besides improperly confining review to the trial record, the Memoranda justifies state habeas counsel's performance by devising some reasonable explanation for state habeas counsel's failure to investigate further. *Memorandum* at 12. However, *Strickland* deference does not require proof that previous counsel had no conceivable reason for inaction, but rather requires a showing that post-trial counsel did not have a **strategic** reason for pursuing a clearly stronger claim than those raised on appeal. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000). Because the Memorandum applied the wrong standard, its *Trevino* analysis of state habeas counsel's performance is manifestly erroneous.

10. Third, the Memorandum does not find that there was no evidence that Green was mentally ill in the record nor find that there was insignificant evidence. To do so would be

unreasonable, as trial counsel stressed to the jury that he thought his client was seriously mentally ill or "sick" to the point that his actions appeared suicidal. 18 RR 22-23. The record also contains paranoid pleadings filed after the trial court granted Green's right to proceed *pro se* in which Green complains that the judge is "judges are 'slam[m]ing Attorneys' on this case to get [him] convicted." CR at 186. The Memorandum therefore manifestly errs as a matter of law in ruling that state habeas can forego investigating incompetency claims so long as the trial record state habeas counsel is "faced with" contains sufficient evidence of *competency* to justify state habeas counsel's alleged determination that "he did not have a viable claim that trial counsel were ineffective for failing to challenge Green's competency to stand trial." *Memorandum* at 14, 17.

11. State habeas counsel must act like an advocate in considering what claims to raise, not like a court constrained by doctrines of deference. Seminal Supreme Court decisions require that counsel to object to their client's incompetency upon noting evidence raising a substantial doubt that a defendant is incompetent. *See Drope v. Missouri*, 420 U.S. 162, 180 (1975). State habeas counsel have a corresponding duty to investigate and develop the record if he is, or should be, aware of some evidence that his client suffered from a serious mental illness likely to have affected his client's ability to assist counsel or have a rational as well as factual understanding of the proceedings against him. Rather than focusing on evidence of incompetency, the Memorandum scours the record for evidence that could be interpreted as signs of competency in order to excuse state habeas counsel's failure to raise claims such Claim Five and Six in Green's federal petition, Consequently the Memorandum rests on a manifest error of law.

12. A fourth fundamental analytical error is the Memorandum's position that, without the benefit of expert assistance, state habeas counsel, faced with a record that contains evidence of mental illness (such as trial counsel Moncriffe proclamation in closing argument that Green was

sick and had made such irrational decisions he thought Green was suicidal (18 RR 22-23)) can forego investigating competency claims so long as state habeas counsel could find some explanation other than mental illness for aberrant conduct or verbal behavior.

13. Because of this fundamental analytic error the Memorandum discounts the significance of Green's rambling and inarticulate verbal behavior during colloquies, voir dire, and trial, and instead justifies state habeas counsel's failure to investigate competency based IAC claims on the ground that Green's lack of education and unfamiliarity with legal terms could explain his "rambling" and inarticulate expressions. *Memorandum* at 13, 16. However, the assumption that state habeas counsel could differentially diagnose the cause of Green's aberrant verbal behavior is not supported by any evidence, **and, as a finding of fact, it is manifestly erroneous.**

14. In a report specifically addressing the Memoranda's rationales for differentially diagnosing the underlying cause of verbal behavior reflected in the trial record, Dr. Diane Mosnik explains that evidence mental illness independent of the aberrant verbal behavior reflected in the transcripts, such as the affidavits of Green's relatives, the affidavit of a fellow inmate, and Green's writings, means one cannot reasonably find that Green's rambling, inarticulate verbal behavior was the result of socio-economic factors rather than a mental disorder. **Exhibit '1'** at 1-2. Green's aberrant verbalizations during colloquies, jury selection and throughout trial are, in fact, evidence that onset of Green's severe mental illness preceded trial and rendered Green incompetent to stand trial. *Id.*

15. The Memorandum finds that Green provided substantial evidence he was incompetent to stand trial, enough to warrant a retrospective hearing. *Memorandum* at 17. At the same time, the Memorandum finds (upon review of the trial record) that Green knowingly,

voluntarily and intelligently waived his right to counsel so state habeas counsel did not have to conduct an extra-record investigation. *Id.* at 19. However, that is clearly not the proper analysis, so the Memorandum rests on manifest errors of law.

16. Dismissal of Green's Sixth Claim solely upon the finding that Green "knowingly, voluntarily and intelligently waived." *Memorandum* at 19. However, when there is "reason to doubt the defendant's competence," a court should make a competency determination before finding the waiver to be valid. *United States v. Ross*, 703 F.3d 856, 867 (6th Cir. 2012) (citing *Godinez v. Moran*, 509 U.S. 389, 400–01, 402 n. 13 (1993)). Hence, it is incumbent upon trial counsel to investigate competency in preparation for a *Faretta* hearing. *See Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001). Because the Memorandum failed to consider whether trial counsel or state habeas counsel failed to investigate and prepare to litigate the preliminary competency question, the Memorandum's involves a manifestly erroneous application of law.

MANIFEST INJUSTICE

17. For three reasons, the Memorandum summary dismissal of Green's First, Fifth and Sixth Claims is also manifestly unjust and therefore should be reconsidered.

18. First, State habeas counsel alleged seven claims, all of which were **non-cognizable**. **Exhibit '2'**. Instead of filing proposed findings of fact and conclusions of law, state habeas counsel filed a "Statement of Counsel" declaring that he did not have a good faith basis for asking for habeas relief and urging the state court to find that every claim he raised meritless. **Exhibit '4'**. The Memoranda puts this Court on record as finding that this execrable performance fell within reasonable professional standards. Summarily dismissing Green's First, Fifth and Sixth Claim on

the ground that state habeas counsel's performance was not deficient under *Trevino* is clearly manifestly erroneous and manifestly unjust.

19. Second, the Memorandum grants summary judgment to Respondent upon finding that state habeas counsel alleged review of the record was sufficient reason to forego further investigation into questions regarding Green's competency that underlie Green's First, Fifth and Sixth Claims. *Memorandum* at 14, 17, and 19. However, Respondent maintains that "the record does not indicate that Green['s counsel] was diligent in state court developing a basis for Green's competency claim." DE [57] at 10. Clearly it is manifestly unjust to grant summary judgment to Respondent based on a critical finding of fact that Respondent disputes.

20. Third, Green's Sixth Claim (trial counsel violated Cronic by abandoning Green at the initial Faretta hearing despite available evidence that Green suffered from a mental disorder) merits summary **relief.** Cases on point from several Circuits provide the proper analysis under Cronic of Green's Sixth Claim for relief. *See Appel, supra; United States v. Collins*, 430 F.3d 1260, 1265–66 (10th Cir. 2005). The Memorandum failure to apply this reasoning, with which recent Fifth Circuit authority indicates that the Fifth Circuit is in accord, *see Austin v. Davis*, 2016 WL 2619443 (5th Cir. May 6, 2016)(unpublished), is manifestly erroneous and manifestly unjust.

BRIEF IN SUPPORT OF CROSS-MOTION FOR RECONSIDERATION OF GREEN'S FIRST, FIFTH, AND SIXTH CLAIMS FOR RELIEF

STANDARDS

Multiple courts within the Fifth Circuit have applied the Rule 59(e) legal standards to motions to reconsider interlocutory orders. *See Morgan v. Mississippi*, 2009 WL 1809417, at *2 n.1 (S.D. Miss. June 23, 2009)(holding that the Court will apply the Rule 59(e) legal standards to motions to reconsider interlocutory orders, and also noting that many other courts in the Fifth

Circuit have done so). Rule 59(e) requires the movant to (1) clearly establish a manifest error if law or fact, (2) present newly discovered evidence, or (3) demonstrate that there has been an intervening change in the controlling law. *Simon,* 891 F.2d at 1159 (internal quotation marks and citation omitted); *Schiller v. Physicians Res. Group Inc*., 342 F.3d 563, 567 (5th Cir. 2003). Courts also consider whether reconsideration will prevent a manifest injustice, *see In re Benjamin Moore & Co*., 318 F.3d at 629, and whether the district court has "obviously misapprehended a party's position." *Foutty,* 764 F. Supp. at 622.

BACKGROUND

On September 18, 1999, a Harris County Grand Jury indicted Green for the capital murder of Kristin Loesch. CR at 3. By the end of trial on December 7, 2000, the trial court had appointed three sets of lawyers. On September 20, 1999, the Court appointed William Ken Goode and Charles Hinton to represent Green. CR at 4. On March 1, 2000, the Court appointed Wayne Hill, who replaced Goode.[1] CR 9. On March 21, 2000, the trial court convened a hearing on Green's motion to represent himself, and granted Green's motion. Hinton continued as standby counsel, as did Hill, until Hill withdrew completely on July 17, 2000. CR at 52.

On April 4, 2000, the trial court issued an "Order Appointing Counsel," namely, Tyrone Moncriffe, which stated as follows:

> On this the 4th day of April, 2000, A.D. it appearing to the Court that the above named defendant has executed an affidavit stating that he is without counsel and is too poor to employ counsel it is ordered that the attorney listed below is appointed to represent the above named defendant in said cause.

CR at 52.

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[1] Goode withdrew but was later re-appointed to appeal Green's conviction. CR at 27.

The April 4, 2000, Order did not designate Moncriffe as standby counsel. However, Moncriffe functioned as standby counsel through the end of guilt-innocence. On December 6, 2000, at the beginning of the punishment phase, Moncriffe took over the representation of Green. 17 RR 10. Moncriffe did not move for a continuance. On December 7, 2000, Green was sentenced to death. 18 RR 50-51.

On October 15, 2001, state habeas counsel filed a twelve (12) page Application for a writ of habeas corpus. **Exhibit '2'** (CR.17-28). The three claims state habeas counsel briefed had already been raised and rejected on direct appeal; hence, these three claims were not cognizable. *See Ex parte Acosta*, 672 S.W.2d 470, 471–72 (Tex. Crim. App. 1984). State habeas listed four other claims, but did not brief facts, argument or authority in support. *Id.* These four claims also were not cognizable. *See Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011) (stating that "Texas law has long required all post-conviction applicants for writs of habeas corpus to plead specific facts which, if proven to be true, might call for relief."). This forecloses argument that state habeas counsel had a strategic reason for no raising a non-frivolous claim.

State habeas counsel concluded the Application with the promise "to develop facts and law" of the four "extra-record grounds for habeas relief with all deliberate speed." *Id.* at 10 (CR.27). However, state habeas never amended the Application. Instead, on April 23, 2008, state habeas counsel filed a "Statement of Counsel" claiming he could "not in good faith file Proposed Findings of Fact and Conclusions of Law requesting that the Trial Court recommend to the Texas Court of Criminal Appeals that relief be granted," and urged that all the claims he raised were meritless. CR.279; *see* DE [30] at 16-17.

The Memorandum puts this Court on record as finding that state habeas counsel's execrable performance not only fell within reasonable professional standards, but justified finding Green's

First, Fifth and Sixth claims for relief procedurally defaulted because of state habeas counsel's performance. For the following reasons, the Memorandum's analysis of the law and facts was manifestly erroneous and manifestly unjust.

I. THE DECISION TO DISMISS GREEN'S FIRST CLAIM FOR RELIEF SHOULD BE RECONSIDERED.

A. BACKGROUND (Scope of Motion to Reconsider First Claim)

In his First Claim for relief, Green alleged that Hill, Hinton and **Moncriffe** were ineffective because they did not investigate mitigating evidence of poverty and mental illness. DE [30] at 19 *ff*. Hinton and Hill had five months to investigate but did nothing despite the need for counsel appointed to a capital case to begin planning immediately for the punishment phase as well as guilt innocence, especially when, as here, the evidence of guilt is substantial. Green also argued that **Moncriffe** should have moved for a continuance as soon as he took over punishment phase duties so that he could investigate mitigating evidence. DE [30] at 6; DE [49] at 8-9. Green moves for reconsideration of the Memorandum's determination that **Moncriffe's** representation did not violate *Strickland v. Washington,* 466 U.S. 688 (1984).

B. ARGUMENT

According to the Memorandum, by the time Moncriffe took over representation at the beginning of the punishment phase it was "too late to conduct an investigation" into mitigating evidence. *Memorandum* at 11. Green urged that Moncriffe was obligated to move for a continuance to secure time to investigate. DE [30] at 6; DE [49] at 8-9. However, the Memorandum rejected this as a basis for an IAC claim upon finding that (i) Green did not show that "any such request would have succeeded, and that (ii) "any need for an adjournment was caused wholly by Green's actions." *Id.*

The Memorandum does not expressly conclude that Moncriffe's performance was acceptable for purposes of *Strickland*'s deficiency prong. Instead of reaching the merits, the Memorandum dismisses Green First Claim for relief on the ground that state habeas counsel could reasonably conclude that "at a minimum, state habeas counsel's conclusion that there was no viable claim of ineffective assistance of penalty phase counsel was reasonable **based on the trial record**." *Memorandum* at 12. That is, the Memorandum found that Green procedurally defaulted his First Claim upon finding state habeas counsel's performance was not deficient for purposes of *Trevino.*

The Memorandum also does not address whether (assuming deficiency) failure to present the mitigating evidence Green developed in federal habeas proceedings violated *Strickland's* prejudice prong. Reconsideration is therefore justified if: **(i)** the Memorandum's deficiency analysis that resulted in the determination that state habeas counsel's could reasonably conclude that there was no viable claim ineffective assistance of penalty phase counsel was manifestly erroneous; and **(ii)** the Memorandum manifestly erred with regard to the merits to the extent that it found that Moncriffe's decision not to move for a continuance fell within the realm or reasonable professional practice. *Memorandum* at 11-12.

1. Memorandum's *Trevino* analysis was manifestly erroneous

a. Memorandum's legal analysis of state habeas counsel's performance is manifestly wrong.

The Court's determination that state habeas counsel could base a reasonable decision about whether to raise an IAC claim "**on the trial record**" ignores the preclusive effect of Texas post-conviction case law. A claim based on the trial record is "not cognizable on habeas" since petitioners "should have and could have raised it on direct appeal." *Ex parte Ramsey,* 345 S.W.3d. 928 (Tex. Crim. App. 2011) (citing *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex.Crim.App.1989) (op. on reh'g)). State habeas counsel therefore could not reasonably confine his investigation to the trial record, and instead must conduct an extra record investigation in order to raise viable habeas claims.

The Texas Court of Criminal Appeals has also pointed out, "the inherent nature of most ineffective assistance" of trial counsel "claims" means that the trial court record will often fail to "contain the information necessary to substantiate" the claim. *Trevino*, 113 S.Ct. at 1918 (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (1997) (en banc)). Faced with a trial record only, Texas courts entertaining an IAC claim based on failure to request a hearing presume that trial counsel acted strategically. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App.1994); *Howland v. State*, 966 S.W.2d 98, 105 (Tex.App.-Houston [1st Dist.] 1998). State habeas counsel therefore should have sought to develop the trial record rather than rest upon it. The Memorandum's supposition that state habeas counsel could reasonably limit his inquiry to review of trial record is therefore manifestly erroneous as a matter of law.

b. Memorandum's factual analysis of state habeas counsel's performance is manifestly erroneous.

The Memorandum presumes that after reviewing the record, state habeas counsel reasonably concluded "that there was no viable claim of ineffective assistance of penalty phase counsel." *Memorandum* at 12. However, there is no evidence that state habeas counsel contemplated raising a claim alleging IAC based on trial counsel's failure to investigate and present mitigating evidence. The factual finding is a speculative, manifestly erroneous basis for a decision.

c. Determination that State habeas counsel's performance did not fall below objectively reasonable standards was manifestly unjust.

The Memorandum avoids addressing the following unfortunate, but indisputable facts. First, State habeas counsel did not raise a single cognizable claim. Second, rather than submitting proposed findings of fact and conclusions of law, as required by Texas Code of Criminal Procedures 11.071 §8, state habeas counsel filed a "Statement of Counsel" stating he could not in good faith request habeas relief for his death sentenced client, and urging that Green's claims lacked merit. **Exhibit '4'** (attached to DE [30] at 16 as Ex. 'B'). Third, state habeas counsel flat out lied about the lone medical record he purported to have reviewed, claiming there was no indication of incompetency when in reality it diagnoses Green with a major mental illness and described his psychotic thoughts and conduct in detail. DE [30] at 16. In other words, state habeas counsel not only abandoned Green, he intentionally undermined his opportunity for state habeas relief. Justifying procedural default of Green's important habeas claims on the ground that this miserable, unethical performance was minimally competent is manifestly unjust.

2. Memorandum's analysis of the merits of Claim One is manifestly erroneous legally and factually.

a. The factual predicate underlying dismissal of Claim One is manifestly erroneous.

The Memorandum finds that by the time Moncriffe "assume[d] an active role… it was too late to conduct an investigation." *Memorandum* at 10. However, this begs the question and is therefore a manifestly erroneous factual basis for denying relief. For had Moncriffe successfully moved for a continuance he would have time. Indeed, the Memorandum implicitly recognizes that time to investigate was necessary, making lack of time a contradictory basis for finding Moncriffe's decision not to request more time fell within the realm of reason. Because the

Memorandum rests on such manifest errors of fact, this Court should reconsider the Memorandum's dismissal of Green's First Claim for relief.

b. The determination that a motion for a continuance was unjustified and would not be granted is predicated on manifestly errors of fact and law.

The Memorandum assumes that Green had to prove Moncriffe would have been able to procure a continuance, and claims that Green did not. However, Green explained a length why an investigation into mitigating evidence is vital in a capital case. DE [30] at 22-23. Green attached extensive documentary and affidavit evidence that trial counsel and state habeas counsel could have readily developed. DE [30]; DE [49] (Traverse). This evidence included testimony from relatives and family friends attesting to the pretrial onset of Green's mental illness, his lack of education, his likely sexual disorientation, and his homeless transient lifestyle that left him dependent on others or on the streets. **Exhibits '5', '6', '7', '8'** and **'9'**. All these witnesses were readily available as they attended trial or were next door in the Harris County Jail.

On the other hand, there is no evidence that a continuance would have inconvenienced jurors, the State or the trial court. *See United States v. Osorio*, 587 Fed. Appx. 388, 389 (9th Cir. 2014)(reversing failure to afford continuance because government failed to advance reasons justifying a denial). Furthermore, Green was not advised that the trial court would refuse to continue trial to allow standby counsel to prepare. There is no evidence Green was attempting to manipulate the judicial system by allowing Moncriffe to take over representation. A continuance would not disturb the jury's assessment of guilt-innocence, and the importance of mitigating evidence in capital cases is of constitutional magnitude. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982)*; Brownlee v. Haley*, 306 F.3d 1043, 1079 (11th Cir. 2002) (holding that the "right to introduce all mitigating evidence is too essential, to permit a judge to correct so egregious a failure by counsel to investigate, obtain, or present powerful mitigating evidence to the sentencing jury.”).

Under the foregoing circumstances (proof that a continuance necessary to develop vitally important mitigating evidence coupled with zero evidence of inconvenience to state, court or jurors), denying a continuance would be entirely arbitrary and therefore an abuse of discretion. Insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *See Chandler v. Fretag*, 348 U.S. 3, 10 (1954). The Memorandum’s supposition that state habeas counsel could assume from the trial record that Moncriffe could reasonably forego seeking continuance involves a manifestly erroneous legal determination.

Texas trial courts have long held equitable powers to grant or deny continuances subject to review for an abuse of discretion. *Darty v. State*, 193 S.W.2d 195, 195 (1946). Under the circumstances of a death penalty case that has progressed to the penalty phase without the benefit of an investigation into mitigating evidence, failing to grant a continuance for reasons listed in the Memorandum – namely, that jurors had already spent considerable time, jurors would have to come back – would clearly be an abuse of discretion. The opinions reliance on such rationales to find that failure to request a continuance fell within the realm of reasonable professional decisions is therefore erroneous as a matter of law.

When the circumstances surrounding the trial court's denial of an oral motion for continuance amount to a denial of the rudiments of due process such a denial is subject to reversal on appeal. *See Brown v. State*, 630 S.W.2d 876, 880 (Tex. App.—Fort Worth 1982, no pet.). Had the trial court given Moncriffe the authority recognized by the Supreme Court in *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984), to prepare for the punishment phase, then denial of continuance could possibly be justified. However, the trial court did not allow standby counsel to assist Green even with ministerial tasks, such as serving subpoenas, and told Green that the Court was not going to let Moncriffe make objections. 3 RR 15, 33. Consequently, due process would have entitled Moncriffe to a continuance. The Memorandum's speculative determination to the contrary should therefore be reconsidered.

c. Proper analysis forecloses dismissal of Green's First Claim on ground Green failed to satisfy *Trevino*.

The relevant inquiry is whether Moncriffe had some strategic reason for not moving for a continuance. *See In re M.S.*, 115 S.W.3d 534, 549 (Tex. 2003) (citing Strickland, 466 U.S. at 689). Green has produced substantial evidence his decision absolutely was not. At the August 17, 2000, pretrial hearing, Moncriffe recognized that testimony of a mitigation specialist was absolutely necessary to ensure a fair punishment phase, stating that,

> 7 if Mr. Green decides not to
> 8 represent himself during any phase of the trial I don't
> 9 have the expert witnesses for mitigation for future
> 10 dangerousness. And I think that would be a direct
> 11 violation of due process your Honor for the 14th
> 12 Amendment. And it just concerns me greatly at this
> 13 point. I would like to have that at least available…

3 RR 12.

Green's evidence makes a substantial showing that Moncriffe was obligated but failed to move for a continuance, and failed to move for the appointment of a mental health expert, so he could develop and present the type of mitigating evidence he realized he needed to defend against the death penalty.

d. Blaming Green is manifestly unjust.

Particularly in light of this Court's determination that there is significant evidence that Green suffered from a serious mental illness throughout trial, *Memorandum* at 17, blaming Green for "any need for an adjournment," *id.* at 11, then using this as a reason for denying relief on Green's First Claim is manifestly unjust. This Court should therefore reconsider the decision to dismiss Green's First Claim for Relief.

II. OPINION DISMISSING GREEN'S FIFTH CLAIM FOR RELIEF SHOULD BE RECONSIDERED.

A. BACKGROUND

1. Evidence of incompetency presented federal habeas proceedings.

Green's Fifth Claim alleges that "appointed counsel fail to bring evidence demonstrating Green's actual incompetence to stand trial to the attention of the convicting court in violation of due process and the sixth amendment." DE [30] at 73. Incorporating evidence and argument in Green's Second and Third Claim for relief, Green asserted that neither Hill, Hinton nor Moncrief investigated his mental health, brought significant evidence incompetency that they were already aware of to the attention of the trial court, objected that Green was incompetent to stand trial, nor sought expert assistance. *Id.* at 73-74. Amongst the evidence Green showed was available to trial counsel and later to state habeas counsel were the following:

- Information from relative and acquaintance, **who attended trial** and were willing and available to talk to counsel, such as:
  - First cousin Jerry Lee Jacob's familiarity with Green as a child and young adult, and his awareness that before trial Green had started acting strangely, expressed fears he was being followed when he was not, was distracted by voices, and

appeared to be conversing with persons who were not present. **Exhibit '5'** (Filed with DE [49] as Ex. '1').

- Green's significant other, Deborah Duggar's, information about Green's constant run in with police, his homelessness, chronic unemployment, lack of education and occupational skills, and irrational, paranoid behavior. **Exhibit '6'**. (Filed with DE [49] as Ex. '2').
- Long time Michael Turner's familiarity with Green's transient life, distracted inattentive behavior, and his inability to assess and react appropriately and rationally in common social situations, such as applying for a job. **Exhibit '7'**. (Filed with DE [49] as Ex. '3').
- Green's mother, Betty Ivy's, knowledge of Green's impoverished background, abandonment by his father, Green's lack of education or employment, Green's homelessness and transience immediately preceding the murder, and Green's likely sexual confusion and vulnerability to older men. **Exhibit '8'**. (Filed with DE [49] as Ex. '4').

• Information from Harris County inmates housed with Green while he awaited trial, such as Clarence LaDay, who could attest to Green's wildly irrational and disturbing behavior in the prison, his inability to communicate normally with jailhouse personnel and other inmates, and Green's incomprehension of his legal situation.[2] **Exhibit '9'**. (Filed with DE [49] as Ex. '5').

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[2] The sworn statement of Mr. Clarence LaDay states that Mr. Green did not know how to write motions and, in fact, that he had been trying to help Mr. Green write motions back in 2000 during the time of Mr. Green's trial. Mr. LaDay further stated that he had thought that Mr. Green was "mentally retarded" because he was "in and out of sentences" and "you couldn't follow him." Mr. LaDay stated that Mr. Green spoke in "broken sentences and acted erratic." Mr. LaDay reported that he would often try to pray

- Letters and pleadings Green filed evidencing Green's paranoid distrust of his attorneys and the legal system, and his incomprehension of the nature the proceedings against him, including irrational beliefs that he could be released on bond, that Johnny Cochrane would be willing to represent him, and that the court kept appointing attorney's in order to convict him. **Exhibit '10'**.
- Aberrant and irrational questions and decisions throughout voir dire, during opening remarks, throughout trial, and during closing remarks. *See* Exhibit '1'; *and see* DE [30] at 32-52.
- Aberrant conduct, in the presence of counsel Moncriffe, such as "act[ing] like he's talking with a third party" and "act[ing] out conversations between himself and another party" when no other party was present. DE [30] at 71-72; CR 268.
- Moncriffe's own observations that his Green was behaving increasingly paranoid, (11 RR 8) and that Green was mentally "sick," and had made such irrational decisions selecting the jury that Moncriffe considered Green suicidal. 18 RR 22-23.
- Evidence in psychologist, Steven Rubenzer's report that Green irrationally distrusted his attorneys, and was paranoid and inappropriate in the courtroom and during psychological evaluation for competency. CR 268.

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with Mr. Green to help him calm down and would direct him to take showers because he wouldn't otherwise shower. He also stated that Mr. Green exhibited odd behavior while in jail in 2000, stating that he would often be in his cell naked and masturbating and would "tear up his property in his cell block." Mr. Green reportedly couldn't get along with people and wouldn't just stay in the day room and talk to people. Mr. LaDay reported that others couldn't understand Mr. Green and also reported that "four or five times a week, Green would be just out of it." **Exhibit '9'.**

- Green's aberrant behavior in the courtroom, including his refusal to wear street clothes and insistence on appearing in his garish, orange Harris County Jail pajamas. **Exhibits '5' and '7'**; 18 RR 3.

2. Scope of motion to reconsider Green's Fifth Claim.

Green seeks reconsideration on the ground that **Moncriffe's** failure to seek expert assistance and object, upon taking over Green's representation, that Green was incompetent "deprived [Green] of his Due Process right to a hearing to determine whether he was competent to stand trial, and harmed [Green] because he was tried while actually incompetent." DE [30] at 73-74.

3. Summary of the Memorandum's rational for dismissing Green's Fifth Claim.

The Memorandum denied relief on Green's Fifth Claim **on procedural grounds**. *Id.* at 14. The Memorandum acknowledges that "Green cites evidence that he was mentally ill." *Id.* However, the Court still "could not conclude that [state habeas counsel] McLean, **faced with the trial record**, fell below prevailing professional norms in concluding that he did not have a viable claim that trial counsel were ineffective for failing to challenge Green's competency to stand trial." *Id.* According to the Memorandum,

- "The trial record includes several separate occasions on which the trial judge inquired as to Green's waiver of counsel and concluded he understood the effects of that waiver." *Memorandum* at 13, 14
- "Green's answers to their [the Judge's] questions, while rambling at times, were lucid and responsive." *Id.* at 13

- "The record included a contemporaneous competency evaluation [of Green] by a court-appointed mental health professional" that "determined he was competent." *Id.* at 14, 13.

As a result, the Memorandum determined that *Trevino* did not excuse Green's failure to raise his Fifth Claim for relief in state court proceedings resulting in "procedural default of [this] claim." *Id.*

B. ARGUMENT FOR RECONSIDERATION OF DECISION TO DISMISS GREEN'S FIFTH CLAIM FOR RELIEF.

1. Memorandum's *Trevino* analysis was manifestly erroneous as a matter of law.

a. Memorandum presumes that state habeas counsel could reasonably confine his investigation to the trial record but Texas law precluded record based habeas claims.

State habeas counsel was obligated not only to consider evidence of incompetency that the record shows trial counsel knew about, but also develop evidence the trial counsel should have known about. *Strickland*, 466 U.S. at 691 (Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Porter v. McCollum*, 588 U.S. 30, 40 (2009) (rebuking counsel for ignoring avenues for investigation of which he should have been aware"). However, contrary to these fundamental precepts, the Memorandum presumes state habeas counsel could rely exclusively on the record. As shown above in section I.B.1.a, Texas law tends to preclude IAC claims that rest solely on an appellate record, since any claims that could have been brought on direct appeal are defaulted and non-cognizable in collateral proceedings. *See Ex parte Banks*, 769 S.W.2d at 540. The Memorandum's determination that state habeas counsel could restrict his investigation to the appellate record is therefore manifestly erroneous as a matter of law. This Court should therefore reconsider the Memorandum dismissing Claim Five.

b. **The Memorandum's justification for why state habeas counsel could forego contesting Green's competency to stand trial directly contradicts seminal Supreme Court and Fifth Circuit decisions and is manifestly erroneous.**

In his Fifth Claim for relief, Green presented evidence from multiple sources documenting erratic, psychotic behavior, including testimony from relatives and friends who could have provided testimony establishing that that Green began hearing voices and was paranoid thoughts and irrational long before trial. **Exhibits '5'-'9'.** Moncriffe, after he was appointed to conduct the punishment phase, could have developed and presented extra record evidence had he moved for a competency hearing since these witnesses attended trial or were readily accessible and available. State habeas counsel unquestionably could have investigated these witnesses. The Memorandum, however, fails to consider this evidence, and other evidence of incompetency contrary to Supreme Court and Fifth Circuit law

In *Drope v. Missouri*, 420 U.S. 162, 180 (1975), the Supreme Court explained the import of its decision in *Pate v. Robinson,* 383 U.S. 375 (1966), resided in the *Pate* court's instruction that

> evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

In *Bouchillon v. Collins,* 907 F.2d 589, 596 (5th Cir.1990), the Fifth Circuit found counsel ineffective because he was aware of his client's mental illness but did not investigate the issue of competency.

Moncriffe was aware Green was mentally ill (18 RR 22), and that his sick[ness] impaired his ability to communicate with counsel, (11 RR 8-9) but he did not investigate witnesses at hand who could have detailed the onset of Green's strange conduct, thoughts and verbal behavior, indicating that Green was suffering from a severe psychosis. **Exhibit '1'.** State habeas counsel either knew Green was mentally ill or else should have known, but did not investigate. The Memorandum's reason for finding *Trevino* does not apply to Green's Fifth Claim is therefore manifestly erroneous.

c. Memorandum's assumption that state habeas counsel could rely on evidence of competency to dispel significant concerns about Green's incompetency was manifestly erroneous.

"Once there is such evidence from any source," that a defendant is incompetent, "there is a doubt that cannot be dispelled by resort to conflicting evidence." *Lindhorst v. United States*, 658 F.2d 598, 607 (8th Cir.1981) (quoting *Moore v. United States*, 464 F.2d 663, 666 (9th Cir.1972)), cert. denied, 454 U.S. 1153 (1982). Even if it were reasonable to suppose that Green responses to the court and during voir dire were "lucid or, to the extent they rambled, due to his lack of education," neither trial counsel nor state habeas counsel could discount other evidence of mental illness they knew or should have known about, including extra-record evidence.

The Memorandum takes the position that state habeas counsel could confine his investigation to the record at trial, and dispense with further investigation because of evidence of competency in the record. The Memorandum fails to focus on record based evidence of incompetency and completely disregards extra-record evidence of incompetency that trial counsel and state habeas counsel should have developed. *See Brown v. Estelle,* 701 F.2d 494, 495 (5th Cir. 1983). The Memorandum therefore rests on a manifestly erroneous legal basis.

d. **Proper legal analysis is (i) whether trial counsel, in light of evidence related to Green's mentation that he knew of or should have known about, had a strategic reason not to raise the issue of his client's incompetence, and, relatedly, (ii) whether state habeas counsel had a strategic reason for not raising IAC.**

In this case, the record shows Moncriffe's interactions and observations of Green convinced him that Green was paranoid to the point his competency to represent himself was questionable. 11 RR 8. Moncriffe witnessed Green carrying on conversations as though with third persons although no third person was present. CR at 000268. *Id.* Moncriffe's observations and interactions with Green left Moncriffe with the impression Green was "sick". 18 RR 22. Moncriffe considered Green's decisions so irrational that he could only explain them as suicidal. 18 RR 22. Green refused follow Moncriffe's directions, and refused at several points during trial to take off his Harris County Jail uniform and put on street clothes. **Exhibits '5', '7'**.

Under *Pate*, the foregoing facts Moncriffe was aware of constitute precisely the type of first hand knowledge of a client's compromised mentation that requires trial counsel to object and requires counsel to inquire further. Had Moncriffe simply queried relatives and friends in attendance at trial he would have discovered Green's history of psychotic behavior. **Exhibits '5-9'**. Once evidence of incompetency arises, there is no strategic reason to forego objecting. *Jermyn v. Horn,* 266 F.3d 257, 283 (3d Cir.2001); *United States v. Boigegrain*, 155 F.3d 1181, 1188 (10th Cir.1998), cert. denied, 525 U.S. 1083 (1999).

d. **Reliance on Faretta colloquies and demeanor was clearly erroneous.**

The Supreme Court has instructed that a finding of competency at one point of the proceedings may be overcome later by further evidence that a defendant is not competent. *Drope v. Missouri,* 420 U.S. 162, 181 (1975). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Id*. The Memorandum's supposition that state habeas counsel could rely on Faretta colloquies held six months and three months before trial to forego investigating Green's competency to represent himself is manifestly erroneous in light of the evidence of incompetency that arose after the colloquies in Green's writings (Exhibit '10') and during voir dire and trial. *See* DE [30], Ex. 'F' (Forensic Report of Diane Mosnik, PhD, analyzing Green's verbal behavior during proceedings).

In Green's case, the trial court never held a hearing devoted to competency, nor made findings pursuant to *Dusky v. United States*, 362 U.S. 402 (1960), regarding Green's present ability to assist counsel or comprehend proceedings. The references to competency at the March 21, 2000 Faretta colloquy were far too perfunctory. The trial court merely inquired into whether Green had "ever been declared incompetent by any court before," and whether Green was "making any claim now that you are incompetent or unable to represent" himself at trial. 2 RR 13. The inquiry into competency at the August 17, 2000 Faretta colloquy was worse, with the trial court merely stating, "You're not telling the Court that you're mentally ill or that you're incompetent or that you're insane are you?" 3 RR 29. On neither occasion did the trial court inquire into whether Green had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he ha[d] a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402.

Memorandum's supposition that state habeas counsel could rely on demeanor evidence to forego investigating Green's competency to represent himself was manifestly erroneous. The Supreme Court in *Pate* instructed that reliance on demeanor "might be relevant to the ultimate decision as to his [competency], [but] it cannot be relied upon to dispense with a hearing on that very issue." *Pate*, 383 U.S. at 386. In light of evidence of incompetency that the record shows came to Moncriffe's attention after the March 21, 2001 Faretta colloquy and after the August 17, 2000, Faretta colloquy, Moncriffe could not reasonably rely on past demeanor to forego objecting and seeking expert assistance to investigate Green's mental status. Neither could state habeas counsel hypothesize that Moncriffe reasonably relied on the Faretta colloquies in order to forego post-conviction investigation and litigation of competency issues.

e. Memorandum's assumption trial counsel and state habeas counsel can rely on a "neutral" expert is a manifestly erroneous interpretation of law.

The Memorandum's determination that Rubenzer's report justified trial counsel and state habeas counsel' decision not to object to Green's incompetency at trial and forego raising IAC post-conviction is also manifestly erroneous. Under Texas law, "[i]f during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial." TEX. CODE CRIM. P. ANN., ART. 46.02 § 2(b) (Vernon 1979).

From the start, Moncriffe had significant difficulties communicating with Green. 3 RR 32. Green's comments during Faretta colloquies, along with his pleadings, show Green believed that "judges are "slam[m]ing Attorneys" on this case to get me convicted," CR at 186, instead of permitting him to defend himself pro se. So there was ample evidence not only that Green was "sick," as Moncriffe told the jury, 18 RR 22-23, but that his sickness impaired his ability to assist counsel and impaired his ability to rationally or factually comprehend the proceedings against him. Given this evidence casting doubt on Green's competency to stand trial, Moncriffe was obligated to object and seek a competency hearing, "irrespective of the psychiatrist's report finding him competent." *See Lindhorst*, 789 F.2d. at 646.

State habeas counsel, like trial counsel, had to function as an advocate and therefore could not reasonably rely on ultimate conclusions of supposedly neutral expert. By the time of trial, *Ake v. Oklahoma*, 470 U.S. 68 (1985), had been extended to require the appointment of an expert if the State put on any evidence, psychiatric or otherwise, of future dangerousness, so long as the defendant's mental condition would likely have been a significant mitigating factor. *See De Freece v. State*, 848 S.W.2d 150, 156 (Tex. Crim. App. 1993) (*en banc*) ((“The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution.”) (citing *Liles v. Saffle*, 945 F.2d 333, 341 (10th Cir.1991)). For these reasons, the Memorandum’s supposition that both trail counsel and state habeas counsel could rely on Rubenzer’s report and forego an investigation is mistaken as a matter of law.

Furthermore, trial counsel and state habeas counsel knew or should have known Rubenzer had **not** been subject to cross examination (or any examination at all) because the trial court did not convene a hearing to consider Rubenzer’s findings. Additionally trial counsel knew or should have known that Rubenzer considered only limited information. Rubenzer interviewed Green’s mother and aunt in passing, did not interview Jacobs, Duggar, Turner or LaDay, (see **Exhibit ‘5-‘7’, 9’**) each of whom could testify to Green’s history of erratic behavior and verbalizations. Rubenzer also did not review Green’s paranoid pleadings, such as **Exhibit ‘10’.** Because the Memorandum disregard this evidence (or assumes that Rubenzer’s conclusions would not change despite it) the Memorandum is manifestly erroneous legally and factually.

2. Memorandum’s factual findings regarding the evidence of incompetency is manifestly erroneous.

The Memorandum finds that Green’s answers the questions that the trial court posed at the March 21, 2000 and August 17, 2000 Faretta inquiries “while rambling at times, were lucid and responsive.” *Memorandum* at 13. The Memorandum also finds that Green’s “rambling” verbal behavior during the voir dire he conducted, and during trial did not was not attributable to a mental illness but "merely demonstrate[d] that [Green] was unschooled in the law and was not a skilled public speaker." *Id.* at 16. The findings are manifestly erroneous for the following reasons.

First, the Memorandum rationalizes Green's verbal behavior in isolation from other data that state habeas counsel and trial counsel knew of or should have known about, including:

> (a) information that led Moncriffe affirm that his client was sick, suicidal and paranoid (3 RR 6-8, 11 RR 9, 18 RR 22);
>
> (b) letters and pleadings accusing he court and appointed counsel of conspiring against him (**Exhibits '10'** ("Complaint Against Judges"); and
>
> (c) observations of relatives, family friends and inmates attesting to the pretrial onset of exceedingly strange conduct and verbal behavior. **Exhibits '5-9'**.

Second, the Memorandum presumes state habeas counsel had the facts and training to differentially diagnose the underlying reasons for Green's verbal behavior as product of his low level of education and unfamiliarity with legal terms and procedures, rather than as the product of mental illness.

The Memorandum's assumptions about state habeas counsel's psychological acuity is baseless, and the hypothesis of a socio-economic as opposed to psychological explanations for Green's verbal behavior is manifestly erroneous. As Dr. Diane Mosnik explains,

> Mr. Green's language use during the court hearings and trial proceedings were not simply indicative of "being somewhat inarticulate or confused about legal terminology," but were, in fact, indicative of a much more serious brain disorder with altered intellectual functioning, cognition, language and thought processes. In fact, on page 17 of the Memorandum and Order, the writer

> recognizes this in stating "Green presents substantial evidence that he was seriously mentally ill within a short time after arriving at TDCJ. This evidence raises questions as to whether that mental illness was present at the time of Green's trial." It is important to realize that when evaluating the speech of someone with schizophrenia, one cannot simply refer to isolated segments of the speech to determine whether or not the individual is, in fact, lucid, rational, and understanding what is transpiring; the entirety of the individual's responses need to be considered. The overall cohesiveness and logicality of the individual's language and thought processes must be taken into account in order to determine understanding. **A person cannot discount the diagnosis and the inherent brain dysfunction by finding possible moments of what might be thought of as lucidity when taken out of context.** One of the core, hallmark characteristics of schizophrenia is that sensory input and language are not perceived and understood the same as would be for someone with normal neurodevelopment. What may seem "lucid and rational" to a clinically untrained listener, is an indication of impaired thought processes in a clinician trained in the diagnosis of schizophrenia.

Exhibit '1' at 1-2.

b. The presumption that state habeas counsel had only the trial record to consult is a manifestly erroneous finding of fact.

State habeas counsel was not "faced with a trial record" and nothing more. State habeas counsel had even better opportunities, due to proximity in time to the trial, than federal habeas counsel to contact relatives, significant others and family friends such as Green's first cousin Jerry Lee Jacobs, his significant other Deborah Dugger, his mother Betty Ivy and family friend Michael Turner. **Exhibits '5-8'.** State habeas counsel also had a better opportunity than federal habeas counsel to identify jailhouse lawyers, such as Clarence LaDay, who wrote some of Green's pleadings, to inquire about his familiarity with Green and his availability at trial. **Exhibit '9'**. State habeas counsel also had the ability to review the pretrial pleadings Green authored, which were replete with delusional and paranoid thinking. *See, e.g.,* **Exhibit '10'**. State habeas counsel should have obtained Green's TDCJ file, which documents that thirty days month after conviction prison staff asked Green to take the MMPI but Green declared that the government would use "the profile" against him, (DE [30], Exh. 'A' at MAMHE000001) and that on April 4, 2001, four months after conviction, Green was transferred to the Estelle Medical Unit for psychiatric treatment, *id.* at MAMHE000002, and that on September 1, 2001, Green refused to consent to a mental health referral. *Id.* at MAMHE000002.

III. THIS COURT SHOULD RECONSIDER THE OPINION DENYING RELIEF ON GREEN'S SIXTH CLAIM.

A. BACKGROUND

Green alleged that he received ineffective assistance because Hinton and Hill failed to contest the March 21, 2000, hearing at which he was granted the right to represent himself. 2 RR 1 *ff.* It is indisputable that Hinton and Hill did not prepare for this hearing, did not investigate Green's mental health beforehand and did not participate as advocates in this hearing. Neither Hinton nor Hill made an intervention except to announce their presence. 2 RR *ff.*

Green contended in federal habeas proceedings that Hinton and Hill abandoned Green at this critical stage of proceedings. DE [30] at 76. He further contended that had Hinton and Hill investigated before the hearing they would have discovered that relatives and friends had witnessed the onset of Green's mental illness. *Id.*; DE [49] at 9, 38. They could also have identified and interviewed prisoners who were writing Green's pleadings and thereby discovered Green's extraordinarily erratic pretrial behavior. **Exhibit '9'**. Consequently, Hinton and Hill would have had grounds for seeking the appointment of a defense expert to diagnose Green and contest Green's right to represent himself.

The Memorandum dismissed Green's Sixth Claim upon finding the claim "procedurally defaulted." *Memorandum* at 19. The reason for procedural default, according to the Memorandum, is that "based on the trial record" state habeas counsel could reasonably conclude Green's waiver of the right to counsel was knowing, voluntary and intelligent. *Id.* at 18. Hence, State habeas counsel was not ineffective for purposes of *Trevino*, and Green's failure to present the *Cronic* claim to the state court is not excused.

In support for the reasonableness of state habeas counsel's alleged decision not raise a *Cronic* claim, the Memorandum asserts that "a review of the record … reveals a lucid defendant who responded appropriately to the trial court's questions and admonitions." *Memorandum* at 18 As for the excerpts that Green cited in federal habeas proceedings, the Memorandum contends they merely "show a person with limited education and knowledge of the law." *Id.* at 16.

B. ARGUMENT

1. Memorandum's presumption that state habeas counsel could limit his investigation to the trial record is manifestly erroneous.

Texas's post-conviction doctrines of cognizability and default mean trial counsel cannot reasonably confine his investigation in post-conviction proceedings to the appellate record. *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex.Crim.App.1989) (op. on reh'g). Restricting the investigation to the trial record also breaches Supreme Court cases that requires consideration of evidence of incompetency arising from any source at any time. *See Drope*, *supra.*

2. The Memorandum's understanding of counsel's advocacy role is manifestly wrong.

The Memorandum assumes state habeas counsel could forego investigating and litigating a *Cronic* claim so long as he could find a reason, based on review of the trial record, for why that the claim might not be viable. *Strickland's* deficiency prong, as applied to post-trial proceedings require that state habeas counsel have a strategic reason for not developing evidence outside the record that would allow him to raise a non-frivolous claim. *Id.* at 690; *See Duhamel v. Collins*, 955 F.2d 962, 967 (5th Cir.1992) (discussing how Strickland applies to direct appeal claims). The misconstruction of this fundamental standard was manifestly erroneous.

3. Memorandum's supposition that state habeas counsel could forego investigating competency to waive by relying on trial court's findings that Green knowingly, voluntarily and intelligent waived right to counsel is manifestly erroneous.

Faretta requires that the trial court initiate a colloquy with the defendant regarding his right to counsel, the dangers of self-representation, and the difficulties in representing oneself, so that the defendant is aware of the potential consequences of his decision and his choice to waive counsel is "made with eyes wide open." *Faretta*, 422 U.S. at 835. The court does not have to inquire into the defendant's relationship with counsel. *See Cook v. Schriro,* No. 06–99005, 2008 WL 3484870 (9th Cir. Aug.14, 2008). A finding of knowing and intelligent waiver of counsel, therefore, is not a substitute for an inquiry under *Dusky*. In fact, the Faretta inquiry is a two step process in which competency to waive is preliminary to a determination of knowing and intelligent waiver. *Ross*, 703 F.3d at 867.

4. Memorandum fails to apply case law on point.

Green relied on opinions out of the Sixth Circuit. DE [30] at 78 (citing *Appel v. Horn*, 1999 WL 323805 (E.D.Pa. May 21, 1999) (unpublished) ("Appel I")); DE [49] at 49 (citing *Appel v. Horn*, 250 F.3d 203 (3d Cir.2001) (*Appel II*)). In *Appel II*, the district court appointed a mental health expert who found Appel competent to waive. Appel's attorneys who had only recently been appointed failed to bring evidence of incompetency to the mental health expert's attention and failed to contest a *Faretta* hearing. Despite the district court's finding of knowing, voluntary and intelligent waiver, the Appel II court, under circumstances less compelling than Green's, found that defense counsel's failures violated Cronic and ordered relief.

In *United States v. Collins*, 430 F.3d 1260, 1265–66 (10^{th} Cir.2005), the Tenth Circuit recognized a deprivation of counsel under *Cronic* on facts that Green's matches closely. Collins took the position that the lawyer-client relationship had broken down attorney and sought to withdraw. The district court addressed the withdrawal motion after the competency hearing, as in Green's case, but the Tenth Circuit dismissed counsel's formal, but completely inactive, representation as not enough to satisfy the Sixth Amendment. *Id.* (citing *Cronic*, 466 U.S. at 654-55). Because the government's case for competency was not subject to meaningful adversarial testing, the Tenth Circuit held that Collins was constructively denied counsel. *Id.* Likewise, Hinton and Hill's total inaction constructively denied Green counsel.

The Fifth Circuit recently distinguished *Appel* and *Collins*, but clearly found the *Conic* analysis in these cases appropriate, as has the Eight Circuit. *See Austin v. Davis*, 2016 WL 2619443 (5th Cir. May 6, 2016)(unpublished); *Raymond v. Weber*, 552 F.3d 680, 684-85 (8th Cir. 2009). This Court therefore should reconsider the dismissal of Green's Sixth Claim, apply *Cronic* and order relief.

REPLY TO RESPONDENT'S MOTION TO RECONSIDER ORDER GRANTING AN EVIDENTIARY HEARING ON GREEN'S SUBSTANTIVE COMPETENCY CLAIMS (DE [57]).

Respondent seek reconsideration of this Court's decision to order an evidentiary hearing on Green's Fourth Claim for relief, which alleges that in violation of Due Process Green was tried while actually incompetent. (DE [30] at 65 *ff.*) Respondent puts forth two rationales for reconsideration. The first is that "precedents does not support this Court's finding that unexhausted competency claims are exempt from AEDPA's provisions on exhaustion." DE [57] at 2. The second is that Title 2254(e)(2) "prohibits and evidentiary hearing on Green's substantive competency claim." *Id.* at 8.

A. Respondent fails to cite applicable standards, and merely rehashes arguments made previously.

In its entirety, Respondent's motion to reconsider is simply recapitulates prior arguments for summary relief based exhaustion and procedural default defenses. However, a motion to reconsider is not a proper vehicle for revisiting past arguments that this Court clearly rejected in granting and evidentiary hearing. *See United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007).

Respondent fails to plead the proper standards or meet them. A viable motion to reconsider must demonstrate that the Court made manifestly erroneous findings of fact or manifestly erroneous legal rulings. *Simon*, 891 F.2d at 1159 (internal quotation marks and citation omitted). Other bases are manifest injustice and misapprehension of a party's position and new authority. *In re Benjamin Moore & Co*., 318 F.3d at 629; *Foutty, Inc*., 764 F. Supp. at 622. Respondent does not cite intervening authority. The most recent case law dates back to 2013. DE [57] at 9.

Determining whether a defendant is incompetent is fact intensive. *Pike v. Guarino*, 492 F.3d 61, 75 (1st Cir.2007); *and see, Drope*, 420 U.S. 162, 180 (1975)(listing sources of evidence of incompetency). The inquiry necessitates a searching review. Respondent, however, does not contend that this Court's decision rests on a manifestly erroneous factual finding. Nor could Respondent make such a showing. Green presented extensive medical records, forensic opinions, record excerpts, client compositions, and testimony of trial counsel. *See, e.g.,* **Exhibits '5-10'**. This evidence amply supports the Court's finding that sufficient evidence of incompetency exists to justify convening a hearing on whether Green was actually incompetent to stand trial.

A manifest error of law involves more than dispute over the meaning of precedents. A motion to reconsider "cannot be used to raise arguments which could, and should, have been made before the judgment issued" or "to argue a case under a new legal theory." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir.2005). Respondent does not allege that this Court's decision to grant a hearing on competency rests on a manifestly erroneous interpretation of law, and Respondent's Exhaustion Argument and 2254(e)(2) Argument were raised and rejected.

1. Respondent previously raised his Exhaustion Argument.

In Respondent's Answer and Motion for Summary Judgment, Respondent argued that "since Green has not raised his competency claims in any state-court proceeding—on direct appeal or in state habeas—they are unexhausted. DE [43] at 30-31. Respondent emphasized that because Green's competency claims "are unexhausted, and because Green would not be able to obtain merits adjudication in a future state-habeas application, the claims are procedurally defaulted." *Id.*

Respondent re-urges the same argument in the Motion to Reconsider. DE [57] at 2. Using essentially identical language, Respondent seeks reconsideration of the decision to order an evidentiary hearing on actual incompetency because "unexhausted claims are procedurally defaulted where the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 3 (citations omitted).

2. Respondent does not allege, or prove incidentally, that this Court's decision is manifestly erroneous.

Respondent's pleading is sufficient proof that this Court did **not** manifestly err in disposing of identical argument raised in Respondent's Answer and Motion for Summary Judgment. DE [43]. Respondent acknowledges that in *Silverstein v. Henderson*, 706 F.2d 361, 367–68 (2d Cir. 1983), the Second Circuit addressed only a slightly different issue, but held that a defendant's failure to object or take an appeal on the issue of his competency to stand trial would not bar collateral attack. *Id.* Respondent's convoluted efforts to somehow turn precedents supporting this Court's determination into precedents favoring reconsideration naturally is unavailing.

In fact, Respondent misunderstands the exhaustion requirement and how it can be satisfied. An exhausted claim is one for which there is no longer a state court remedy, whether or not the claim has been presented. See 28 U. S. C. § 2254(c). As the Supreme Court explained in *Engle v. Isaac*, 456 U. S. 107, 125-126, n. 28 (1982), "Section 2254(b) requires habeas applicants to exhaust those remedies "available in the courts of the State." This requirement, however, refers only to remedies "still available at the time of the federal petition." *Id.*. Respondent's contention that "the Texas abuse-of-the-writ doctrine, set out in Article 11.071 Section 5 of the Texas Code of Criminal Procedure, would procedurally bar Green's attempt to raise his ... claim in a subsequent state writ" means the claim is indeed exhausted because there are no state remedies any longer "available" to him. Either there is a remedy that is still available in state court, and hence the claim is unexhausted, or there is not and it is exhausted. In either event, 28 U.S.C. 2254(b) is no obstacle to relief or an evidentiary hearing, assuming the Director is correct that there is no state remedy available.

The case law that Respondent relies upon actually illustrate why Green's Fourth Claim for relief **is** exhausted. In *Medina v. Singletary*, 59 F.3d. 1095, 1107 (11th Cir. 1995), for example, the Court ruled that a substantive incompetency claim is not subject to procedural default. Just like Medina, Green has an exhausted, procedurally defaulted substantive incompetency claim. That *Medina* had presented his claim to the state post-conviction does not matter, since the claim was dismissed on procedural grounds in post-conviction proceedings. In *Sena v. New Mexico State Prison*, 109 F.3d 652 (10th Cir. 1997), the Tenth Circuit determined, as well, that a district court can reach the merits of a competency claim notwithstanding a procedural default of the claim in state court proceedings.

B. Respondent's 2254(e)(2) argument fails because Respondent fails to contend that the Memorandum findings entailing that state habeas counsel was sufficiently diligent was manifestly erroneous.

Respondent stresses that "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." DE [57] at 9 (citing *Williams v. Taylor*, 529 U.S. 420, 437 (2000)). The Supreme Court has held that the inquiry under § 2254(e)(2) is whether the applicant was "diligent" by undertaking "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* (citing *Williams*, supra, at 435).

Under § 2254(e)(2), "failed to develop" means "a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor,* 529 U.S. 420, 4325 (2000). A prisoner is not at fault if he "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* at 435, 120 S.Ct. 1479. "If a prisoner's diligent efforts to develop the facts in state court were thwarted by the prosecutor, state court, or otherwise, then the federal court may proceed to consider whether to hold an evidentiary hearing on a claim not considered by the state court and, likewise, 'good cause' may exist to allow discovery under Rule 6." *See Dispennett v. Cook*, 2001 WL 34039134, *6 (D.Or. 2001). Thomas v. Varner, 428 F.3d 491, 498 (3d Cir.2005) (stating that because "[i]n its customary and preferred sense, 'fail' connotes some omission, fault, or negligence on the part of the person who has failed to do something," "a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance.").

According to the Memorandum, trial counsel was faced with a record militating against pursuing competency based claims. *Memorandum* at 12. Consequently, the Memorandum found that state habeas counsel reasonably determined not to investigate Green's competency to stand trial. *Id.* at 12, 14, 16. The Memorandum further determined that Green decision to represent himself prevented his trial counsel from investigating mitigating mental health evidence. *Id.* at 11. But of course if Green was actually incompetent at the time of trial due to a severe mental illness, which the Memorandum found trial counsel and state habeas counsel had insufficient reason to suspect existed or was impairing him, Green cannot be held to have "failed to develop the factual basis of a claim in State court proceedings." See §2254(e)(2). Surely such and insidious mental illness is the type of unforeseen circumstance that prevents a pro se defendant and his counsel, at any stage of proceedings, from taking purposeful action needed to develop the record at trial.

Respondent does not even bother to contest this Court's findings entailing that Green did not fail to develop the record of incompetency during state habeas proceedings, let alone make an effort to show the finding was manifestly erroneous. Nor does Respondent's Motion for Reconsideration contest the Court's finding that Green's evidence of incompetency raises significant questions about whether Green was so seriously mentally ill that he did not have the present ability at trial to consult with counsel with a reasonable degree of rational understanding nor have a rational as well as factual understanding of proceedings against him. Consequently, Respondent cannot clearly establish that 2254(e)(2) applies to Green's actual incompetency claim, nor show that granting evidentiary hearing was manifestly erroneous.

CONCLUSION

WHEREFORE, Green respectfully requests that this Court grant his cross motion for reconsideration and deny Respondent's motion.

Respectfully submitted,

HILDER & ASSOCIATES, P.C.

By: /s/ *James G. Rytting*
Philip H. Hilder
State Bar No. 19620050
James Rytting
State Bar No. 24002883
819 Lovett Boulevard
Houston, Texas 77006
Telephone (713) 655-9111
Facsimile (713) 655-9112

ATTORNEYS FOR PETITIONER

CERTIFICATE OF CONFERENCE

I communicated with counsel for Respondent who stated Respondent is **opposed** to Green's Cross-Motion for Reconsideration.

/s/ *James G. Rytting*
James G. Rytting

CERTIFICATE OF SERVICE

On July 13, 2016, a copy of Mr. Green's petition for writ of habeas corpus was served upon Respondent by ECF filing or U.S. Mail, return receipt requested, addressed to Georgette Oden, Assistant Attorney General, Capital Litigation, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

/s/ *James G. Rytting*
James G. Rytting

EXHIBITS

Exhibit '1' – July 7, 2001 report of Diane Mosnik, PhD, addressing Memorandum and Order.

Exhibit '2' – 11.071 Application filed October 15, 2001, by Ken McLean

Exhibit '3' – May 17, 2007, psychiatric record from Jester IV

Exhibit '4' – April 23, 2008, Statement of Counsel claiming he could not in good faith urge that the convicting court to grant relief and denying the merits of all habeas claims raised on Green's behalf.

Exhibit '5' – Affidavit of Jerry Lee Jacobs (first cousin)

Exhibit '6' – Affidavit of Deborah Duggar (significant other and mother to Green's child)

Exhibit '7' – Affidavit of Michael Turner (long-time family friend).

Exhibit '8' – Affidavit of Betty Ivy (mother)

Exhibit '9' – Affidavit of Clarence LaDay (Harris County Jail inmate incarcerated with Green during trial proceedings)

Exhibit '10' – Green's handwritten "Complaint Against Judges".